No. 282

In the Supreme Court of the United States

OCTOBER TERM, 1951

SWIFT & COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The findings of fact and conclusions of law (no opinion was filed) of the specially constituted District Court are set forth in the transcript (R. 197–210). The report of the Interstate Commerce Commission (R. 57) appears at 274 I. C. C. 577.

JURISDICTION

The final judgment of the District Court was entered June 21, 1951 (R. 210), and the appeal was allowed July 26, 1951 (R. 211). The juris-

diction of this Court is invoked under 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction was noted October 15, 1951. (R. 228)

QUESTIONS PRESENTED

1. Whether, in the light of the long-existing conditions found to exist in the Chicago stockyard area, the Interstate Commerce Commission acted within its powers in concluding that appellant Swift was not entitled to delivery of livestock at its proposed plant in that area at the line-haul rate.

2. Whether the evidence before the Commission warranted its findings that the switching charge for private delivery to Swift had not been shown to be either unreasonable or discriminatory.

STATUTES INVOLVED

For the pertinent provisions of the Interstate Commerce Act and other Acts here involved, the Court is respectfully referred to Appendix A of appellant's brief.

STATEMENT

This is a direct appeal from the final judgment of a specially constituted district court, sustaining as in all respects valid a report and order of the Interstate Commerce Commission issued and entered in a proceeding entitled No. 29809, *Swift & Company* v. *Atchison, Topeka & Santa Fe Railway Company, et al.*

The Commission proceeding was instituted by complaint filed by appellant (hereinafter called Swift), alleging in substance, that the rates and charges on direct[1] shipments of livestock, in carloads, from points outside Illinois for delivery at its plant in Chicago are unreasonable, unduly prejudicial to livestock as a commodity, and unduly prejudicial to it and preferential of its competitors in Illinois and several other midwestern states (R. 58), in violation of sections 1 and 3 of the Interstate Commerce Act. The complaint prayed the Commission to prescribe reasonable rates, charges and practices, and, particularly, joint through rates between the line-haul railroads serving Chicago and the Chicago Junction Railway[2] and Chicago River and Indiana Railroad, such joint rates to include delivery of livestock shipments on the industrial sidings at Swift's plant in the stock yard area and not to exceed the rates applying on shipments of livestock to the Union Stock Yards (hereinafter called the stockyards) and other points in Chicago at which the railroads deliver such ship-

[1] Shipments consigned directly to packers for slaughter and not offered for sale in the public interest.

[2] The Chicago Junction Railway, a terminal switching carrier, is the only railroad which reaches with its own rails either the stockyards or the industries (including the packers) within that part of the industrial area of Chicago known as the stock yard area. It is operated by the Chicago River and Indiana Railroad as lessee, in connection with the latter's own terminal switching line. For convenience, these two terminal carriers will hereinafter be called the Junction.

ments at the line-haul rates without additional charge (R. 55–56, 59).

Although the Junction has never, except in cases of emergency, switched or transported livestock either to the stockyards or industry sidings, its tariff provided for switching charges on "all carload freight" to or from industries, sidings, team tracks and districts as shown therein. And, following the filing of Swift's complaint with the Commission, the Junction filed schedules proposing to specifically exempt livestock from the traffic it would transport and to cancel the application on livestock of all switching charges published by it except to and from chutes and sidings at the stockyards. On protest of Swift and others the Commission suspended operation of the proposed schedules until July 14, 1948, and thereafter the Junction voluntarily postponed the effective date thereof pending the Commission's decision. The two proceedings were heard on a consolidated record and decided in the same report (R. 59).

Numerous parties representing the Union Stock Yards, producers, buyers, and sellers of livestock, intervened in opposition to the complaint. The United States Department of Agriculture also intervened as an interested party under its administration of the Packers and Stock Yards Act, 1921 (R. 59). Following extensive hearings, a proposed report was issued by the examiner. Exceptions to the proposed report and replies to

exceptions were filed by the parties, and thereafter they were heard in oral argument by the entire Commission (R. 58).

The main issue presented in the Commission proceedings was whether or not Swift was entitled to have direct shipments of livestock delivered by the Junction without a charge in addition to the line-haul rates on a private siding at a plant which it proposed to construct in that part of the stockyard area known as "Packingtown" and just north of its present plant (R. 55–56, 59, 65). Certain of the buildings and facilities of Swift's present plant had become obsolete and inadequate and, therefore, Swift proposed to construct a new packing plant which would have substantial facilities for unloading livestock brought in by rail or truck, including adequate plant tracks and holding pens[3] (R. 65).

The flat line-haul rate on livestock to Chicago applies to public team tracks and industrial sidings on the rails of the line-haul carriers,[4] and

[3] At the time of the hearing, the new, or additional, site was occupied by another concern, but the latter's structures and tracks were to be removed and replaced by new buildings, tracks and facilities (R. 65).

[4] About 1,500 shipments of livestock per year are delivered at public team tracks of five of the line-haul railroads (Ex. 17, R. 1101), and about 6,500 cars per year are delivered on sidings of the Omaha Packing Company, a wholly owned subsidiary of Swift, located on the Burlington some miles north of the stockyards. Formerly the Omaha plant slaughtered and processed a substantial part of the livestock received by it, but in 1932 the plant was destroyed by fire and

also to the stockyards which, in legal effect, is on the rails of the line-haul carriers, since they have trackage rights over the rails of the Junction leading to the stockyards and have for years transported livestock directly thereto, operating with their own engines and crews (R. 60, 78, 79, 286). The line-haul carriers do not have trackage rights to operate over the rails of the Junction to reach Swift's plant or the plants of other packers on the Junction. Nor does the flat line-haul rate to Chicago include delivery of livestock to such plants (R. 60, 78–79, 527, 838–840). The charge of the Junction for switching livestock from junctions with connecting carriers to Swift's plant and other points on its line is $28.80 per car. "That carrier, however, has never, except in an emergency handled ordinary livestock in switching service." (R. 60.) With the exception of such emergency situations,

> For some 70 years the method of conducting terminal operations in the stockyards district has been for the line-haul carriers, using Junction tracks, to carry all shipments of livestock to the stockyards and make deliveries there,[5] and for the

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has not been rebuilt. However, Swift continued to receive and now receives livestock at the unloading pens on the Omaha plant site and trucks the animals from there to its plant in Packingtown (R. 67–68).

[5] Most of the larger packing plants as well as some of the smaller ones and also a number of industries of other sort are located in Packingtown which adjoins the stockyards on

> Junction to perform the switching and spotting of other freight for the packers and many other industries in the area. As a result, the Junction's main tracks, its yards and subyards and their tracks, are peculiarly designed and fitted for the service described, and any change, particularly as contemplating deliveries of livestock to the plants of the packers, would, as might be expected and as is shown, require a conflicting use of such yards and tracks and subject defendant's operations to interference and delays. (Commission's report, R. 72.)

As above said, the main issue in the Commission proceeding was whether Swift was entitled to plant delivery by the Junction of its direct shipments of livestock without charge in addition to the line-haul rates to Chicago. Based upon allegations that the existing interstate rates, charges, and practices on direct shipments of livestock to its plant in Packingtown were un-

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the west and is connected therewith by a network of overhead runways, tunnels and viaducts, owned and maintained by the stockyards. These runways, tunnels, and viaducts are used to drive livestock from the stockyards to the slaughtering floors of the packers, including Swift (R. 65), which latter, however, uses them only to drive livestock which it purchases at the stockyards to the floors of its plant in Packingtown. All of its direct shipments of livestock Swift receives at pens on the property of the Omaha plant on the rails of the Burlington and well outside the congested stockyard area. From there it trucks the animals about 2½ miles to its plant in Packingtown (R. 67).

reasonable and unduly prejudicial and preferential, Swift's complaint prayed the Commission to order the defendant carriers to establish and apply just and reasonable rates, charges, and practices, including joint through rates between the trunk lines and the Junction, under which delivery will be afforded on the sidetrack of its plant and under which the rates and charges shall not exceed those applying to the stockyards and other points in Chicago where the line-haul rates apply without charge in addition thereto (R. 56).

Manifestly and, as stated by the Commission (R. 60), the determination of the issues raised in the proceeding made it

> necessary to consider the track lay-out of the Junction, and the present operations thereover in the handling of so-called dead freight, which term includes perishable and all other freight other than livestock; the method by which livestock has for many years been handled by the line-haul carriers to the Union Stock Yards; the physical operations that would be necessary if the Junction were required to make private-track delivery of livestock, as sought by the complainant; and also, in order to avoid undue preference and prejudice, if it were required to make similar deliveries to complainant's competitors."[6]

[6] The Stockyard Company, created by special statute of Illinois in 1865, was organized by the railroads entering Chicago to replace four widely separated stockyards by a

In performing the switching of dead freight in the stockyard area, the Junction acts as terminal carrier for 27 railroads, 22 of which are

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union stockyard which would provide a livestock terminal for the railroads and a central market for livestock (R. 1019–25). While the original stockholders were the organizing railroads, they disposed of their holdings during the succeeding 12 years. *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry.*, 219 I. C. C. 531. In addition to the establishment of the Union stockyard, the company was authorized by its special charter to construct a terminal railroad to connect with the lines of all railroads terminating in Chicago. Late in 1865, the company completed construction of the stockyard in the open prairies south of the city (R. 917) and also 30 miles of terminal railroad to connect with the then nine railroads serving Chicago (R. 915–9, 920–1). At the beginning the terminal road was used almost wholly for the transportation of livestock to and from the stockyards, the trunk lines then, as now, operating with their own engines and crews over tracks of the terminal road connecting their lines with the stockyards (R. 469, 920). With the establishment, "starting about 1870," of packing plants in the stockyards area and the construction of additional railroads into Chicago, the tracks and facilities of the terminal road were extended to reach such plants and to connect with the new railroads. But, since the packing plants were at first small and the establishment thereof and of other industries was at first gradual, the individual trunk lines were for some years authorized to operate over the switching tracks of the terminal road in carrying dead freight to and from the plants and industries in the area, this continuing until 1887. Thereafter, from 1887 to 1893, the dead freight operations over the tracks of the terminal road were conducted first by one and later by another association controlled by the trunk lines, but, in the latter year, the yard company acquired locomotives and commenced the handling of dead freight itself (R. 921–4). In 1897 the yard company leased its terminal road to Chicago & Indiana State Line Railroad, which railroad and another small railroad were the following

trunk lines; and it serves, not only the packers, but a total of about 499 industries. The principal place of interchange between the Junction

year consolidated into a company known as the Chicago Junction Railway. In 1922, pursuant to authorization by the Commission, the Junction subleased the terminal road to the River Road, a subsidiary of the New York Central (see footnote 2, *supra*), the method of conducting terminal operations, however, remaining the same. In short, from 1865 on, the trunk lines, operating over the main running tracks of the terminal road (now the Junction), have hauled their cars of livestock to the stockyards, making delivery there, and also have hauled all empty stock cars back to their own yards. While for some years the trunk lines conducted dead freight operations to and from the plants of the packers (R. 923), they were not then or at any time authorized to transport livestock over the "dead freight tracks" (R. 924). And from the time when the stockyard company acquired locomotives and commenced its own dead freight operations, the carriers' method of conducting terminal operations in the stockyards area has, except in emergencies, always been the same, that is, the trunk lines operating over the tracks of the terminal road, have carried all livestock to the stockyards and the terminal road, or the lessees thereof, have performed the switching of all other freight for the packers and other industries in the area (R. 469, 920, *Chicago Junction case*, *supra*, 71 I. C. C., at 433).

The industrial development of the stockyards area began with the construction of the first packing plant in 1870 and by 1887 there were 15 such plants (R. 922). Following the annexation in 1889 of the stockyards district to Chicago, public streets were opened up and industrial development became rapid until by 1907 the entire area in the vicinity of the stockyards was built up solidly with permanent buildings (R. 924–6). There was even at that time great congestion in the interchange yards of the Junction, causing delay in the handling of dead freight (R. 925) and, since then, many manufacturing industries have located along the lines of the Junction until now there are 499 served by that carrier (R. 442).

and connecting railroads is the Junction's Ashland Avenue Yard. While that yard consists of a solid mass of tracks, based on the operating purposes thereof it is divided into two yards, known as the South Yard and the North Yard. All inbound cars of dead freight destined to the many industries on the Junction must be delivered by connecting carriers on 9 receiving tracks in the South Yard, and nowhere else, pursuant to a labor agreement between the Junction and its employees entered into in 1946 to avert a threatened strike (R. 61, 463–4, 515–7). After completion of the necessary inspection and carding, the cars are switched by Junction break-up crews to adjoining classification tracks (25, with a capacity of 680 cars) for grouping and movement to base yards serving the respective operating districts. There the cars are reclassified and switched to the private sidings of the industries or to team tracks (R. 61).

The North Yard, which has 24 tracks with a capacity of 700 cars, is the Junction's interchange yard for delivery to western connecting lines of outbound cars of dead freight and of "empties," other than empty stock cars. Cars, loaded and empty, moving from industries on the Junction, are first switched to base yards where they are classified for further movement either to the North Yard or to the Loomis Yard, if for delivery to eastern or southern connecting lines. When moving to the North Yard, such outbound cars,

loaded or empty, are first placed by Junction crews on 3 of the 24 tracks in that yard. Seven other of said tracks are used for holding or classification purposes, leaving available 14 tracks for the delivering of cars to western connecting lines. The movement through the North Yard ranges from 600 to 800 loaded and empty cars per day. The Loomis Yard, above referred to, is the Junction's interchange yard for delivery of outbound dead freight and "empties" to eastern and southern connecting lines. That yard contains 20 tracks with a capacity of 420 cars (R. 62).

A third and very important use is made of the Ashland Avenue yards. Between the North and South Yards the Junction has three parallel main running tracks designated 1102, 1103, and 1104, respectively. The line-haul carriers have trackage rights to operate east-bound over 1103 to the stockyards [7] and west-bound from the yards over 1102 and 1104; and for these rights they pay the Junction $1.50 per car, loaded or empty, handled to or from the stockyards (R. 62). About 63 percent of the trains of the trunk

[7] Such right to operate over track 1103 also extends to dead freight either as carried in a consolidated train for set out on the receiving tracks of the Ashland Avenue South Yard or where the trains consist wholly of dead freight for delivery to the tracks of that yard. See example of Burlington's operations (R. 63). The 12 carriers entering the stockyard area from the east use west-bound running tracks 1101 or 1104 in making delivery of dead freight to the South Yard (R. 70, 636).

lines moving to the stockyards consist exclusively of cars of livestock. Solid trains of livestock entering the stockyard area from the west are hauled by the line-haul carriers over east-bound track 1103 to the unloading chutes in the stockyards. While the cars are being unloaded the engine cuts off, passes around the train and, having coupled on to the other end, hauls the empty cars over westbound tracks 1102 or 1104 to the line-haul carrier's home yard. As stated by the Commission (R. 63):

> Manifestly, as the line-haul carriers must use the same east-bound track into the Union Stock Yards, any delay to a train on that track results in "piling up" trains of other lines seeking ingress to the Union Stock Yards. Frequently as many as four trains must wait to enter this track as a result of its being blocked at the east end. Delays are necessarily experienced also because of "set outs" made by consolidated trains, consisting of livestock and dead freight. In a consolidated train the dead freight is on the head and behind the engine. The cars of livestock are cut off and left standing at the eastern end of the east-bound running track while the line-haul carrier's engine sets the dead freight on one of the nine receiving tracks in the south yard. This operation blocks the running track until the engine returns and hauls the livestock to the Union Stock Yards.

The principal carriers of livestock to the Chicago stockyard district are the western carriers and such carriers, except the Rock Island,[8] must use track 1103, not only because it is assigned for eastbound use, but also because the other two running tracks are used to capacity (R. 636–7). As above stated, all inbound cars of dead freight, whether from western or eastern carriers, must be delivered on receiving tracks in the Junction's Ashland Avenue South Yard. And all outbound dead freight cars, loaded or empty, moving to western carriers, must be delivered by the Junction on tracks in its North Yard. Through those yards there were "funnelled" an average per annum of 726,144 loaded and empty cars during 1945, 1946 and 1947. The yards are in a densely developed industrial part of the city and there is no land available for the expansion thereof or the building of additional facilities nearby for interchange and classification of traffic (R. 60). Under the present practice,

[8] The Rock Island enters the stockyard area from the east. Upon arrival of a consolidated train at the Rock Island's outer yard, the cars of livestock are separated from the dead freight and the former are hauled to the stockyards without passing through the Ashland Avenue yards. All cars of dead freight, however, must be hauled over the Junction's westbound running tracks to the Ashland Avenue South Yard. And any cars of livestock destined to the Omaha plant must also be hauled over those running tracks. These operations of the Rock Island are typical of the operations of other carriers similarly entering the stockyard area from the east, of which there are 12 (R. 70, 489, 636).

followed since 1865, of centralized delivery by the line-haul carriers of all livestock to the stockyards, such carriers also hauling the empty stock cars directly back to their respective home yards, the Junction's interchange and classification yards are not burdened with livestock cars, either loaded or empty (R. 71). In handling the present dead freight traffic alone, the Junction's interchange and classifying yards are worked to capacity (R. 547, 701). And even accepting the view, urged by Swift, that all the Commission needed to consider was the plant delivery of its direct shipments of livestock, averaging 18 cars a day, still cars of livestock cannot be handled in the same simple and expeditious way customarily used in switching and classifying cars of dead freight. While Swift's cars of livestock could be handled in consolidated trains by grouping such cars at the head of the train with the cars of dead freight intended for set-out in the South Yard, nevertheless it would have to be expected that such course would add to the delay and "piling up" of the livestock trains of other carriers, seeking ingress to the stockyards over the same running track. Speaking of this, the Commission report says (R. 72–3):

> * * * Consolidated trains always occasion some delay, since the cars of livestock destined to the stockyards are left standing on the track while the engine hauls the cars of dead freight a short

> distance eastward and then, after backing them onto a sidetrack leading to the receiving tracks of the south yard, "kicks" the cars as previously described. But, while in the case of dead freight the cars may be simply "kicked," if the switching were to include livestock for complainant or other packers, the service would have to be differently performed. Whether the livestock were handled alone or together with the dead freight, the cars could not be simply "kicked," but would have to be switched and actually placed on the receiving track to avoid risk of injury to the animals; and, once the cars were so placed, subsequent switches of dead freight could not be "kicked" and thus permitted to roll freely against the cars of livestock.

Furthermore, the difficulties in handling Swift's cars of livestock would obtain even in greater degree in the Junction's congested South Yard, its base yard (Damen Avenue), and also in making final delivery over auxiliary track 1105 and other track leading to Swift's proposed plant (R. 66–7). Referring to the added burden that would be cast on the South Yard if livestock were diverted through it, the Commission's report says (R. 73–5):

> * * * In its work of classifying dead freight for switching delivery, the Junction, which serves, not only the packers, but hundreds of other industries, follows the usual and timesaving practice of

"kicking," whereby uncoupled cars at the end of the string of cars being classified are sent on their way over the switching lead and onto the proper classification track; but if classification track 19 [assigned to Swift for dead freight], or any other, were to be used for the livestock destined to complainant, neither the livestock cars nor subsequent cars of dead freight could be so "kicked," but would have to be pushed over the lead and along the track to the point of placement, such cars remaining coupled until brought to rest.

Moreover, in the making of any such use of classification track 19, or any other, for complainant's livestock shipments, it would have to be expected that the cars of livestock would often be blocked in between cars of dead freight, and would have to be "dug out" for a special run to complainant's plant. Indeed, it appears that in some instances, immediately upon arrival of a consolidated train including cars of livestock for complainant, the Junction might have to make a special run to deliver the cars at the latter's plant. As above mentioned in practically all cases, livestock arriving at Chicago has only a limited time left before it must be unloaded to avoid violation of the law governing watering and feeding;[9] * * * *.

[9] The law referred to (45 U. S. C. 71–74) provides that livestock may be confined in cars for not more than 28 hours without unloading for rest, watering and feeding unless the

> * * * Moreover, although it is shown that complainant's direct shipments of livestock average 18 cars a day, such average necessarily includes days when the shipment exceeded 18 cars. Also it appears that the number of complainant's direct shipments of livestock in proportion to the number bought at the stockyards has been steadily increasing, and the testimony of complainant's witnesses affords ground for the belief that that condition will continue.

By consigning all its direct shipments of livestock to the Omaha Plant site, Swift now avoids, to some extent at least, (R. 68), the costs incurred by other packers taking delivery of their direct shipments of livestock at the stockyards and paying yardage charges [10] for use of the yards, overhead runways, tunnels and viaducts in driving the animals to their plants. Swift's complaint to the Commission asked for the establishment of joint rates on livestock between the trunk lines and the Junction to its proposed plant, such rates to be at the line-haul level and to include delivery on tracks to be built at the proposed plant. If granted, Swift would, in effect, have been enabled

shipper requests in writing that the time be extended to 36 hours. It is important to note that a stop for rest, water and feed always adds 5 hours to the running time because the law specifies that the animals be given at least 5 consecutive hours of rest.

[10] Sixty-five cents per head on cattle, 40 cents on calves, 21 cents on hogs, and 15 cents on sheep (R. 68).

to avoid any of the running expense incurred by its competitors by reason of the yardage charges they pay. Yet, before the Commission, Swift, in referring to the railroads' contention that, if its demand for plant deliveries at the flat line-haul rate were granted, other packers would make like demands which would have to be complied with, characterized the contention as one resting on an untested assumption or conjecture and thus requiring the Commission to decide the case, not upon facts, but upon prediction, opinion, and prophesy. Answering, the report says in part (R. 76–77):

> But the very nature of complainant's complaint, asking, as it does, that defendants be required to render for its proposed plant a delivery service of a kind new to the stockyards district, necessarily requires exercise of judgment as to the future effects and results. * * * The other packers or some of them may encounter difficulties occasioning delay in the establishment of unloading facilities; in instances the difficulties may cause the packer or packers to conclude not to change to the new method of receiving livestock. Nevertheless, it is our best judgment, and we, therefore, so find and conclude, that, if complainant's demand for the delivery service at the line-haul rates were granted, there would result demands from other packers requiring defendants to render like delivery service in an amount and volume

which together with such service rendered complainant would seriously interfere with, delay, and disrupt defendants' terminal operations in carrying livestock to the Union Stock Yard and in making deliveries of other freight to the industries on the Junction's lines.

Interferences with the movement of livestock to the stockyards is a serious concern not only of defendants but also of producers and livestock marketing agencies who desire expeditious movement of livestock and continued functioning of the public market in a manner that is adequate for their needs. It is the position of these interests that deliveries of livestock on private industrial tracks served by the Junction should be condemned upon the ground that such disposition of livestock is contrary to the public interest. We are not authorized to prescribe the manner in which livestock shall be marketed in the public interest.

We may, however, disapprove the inauguration of a continuing practice of delivering livestock directly to packers in circumstances where, as we have found would be the case here, such practice would seriously interfere with, delay, and disrupt terminal transportation operations and the movement of livestock generally. The proposed complete exemption of livestock from transportation by the Junction under any circumstances is not justified. There is no warrant, however, for a conclusion that the

establishment of joint rates as desired by complainant is necessary or desirable in the public interest.

The record contains adequate facts showing that, if Swift's demand for plant delivery of livestock were granted, other packers would be under strong competitive compulsion to make like demands. The Commission's principal function is legislative in nature, requiring it to project its judgment into the future. Cf. *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 542–544.

Interference with the expeditious movement of livestock to the Chicago stockyards is, indeed, matter of serious concern, not only to the railroads performing the transportation, but to producers and consumers throughout a wide area of the country and also Canada. It is the greatest livestock market in the world (R. 918). In the course of a year, several hundred thousand, possibly half a million, producers ship livestock for sale on the Chicago stockyards market (R. 743). To that market a producer can ship any meat animal, regardless of its species, grade, type or weight, and he will find a buyer. And any buyer in the country, regardless of the quality he likes to buy, the grades, weights or whatnot, can come to Chicago with assurance that he will find the animals he wants (R. 920). This favorable condition of the Chicago stockyards market and its value to producers and consumers necessarily depends on good railroad service. Although now

hemmed in my the City's intensive industrial and municipal development, the Junction's lay-out of yards and tracks is still well adapted for rendering expeditious service by the method, always pursued, of centralized delivery of all livestock at the stockyards by the trunk lines. However, any change now in such method of delivery, particularly as requiring the Junction to assume the lengthy undertaking of switching the livestock of Swift and other packers through its congested yards would not only greatly add to the number of set-outs at the South Yard and consequent delaying of trains seeking ingress to the stockyard, but would also interfere with the trunk line's train schedules by adding to the number of stops for rest, feed and water, increasing the shipper's costs and inevitably narrowing the area from which producers may profitably avail themselves of the Chicago market. (R. 642–4; 680–1; 702–3; 724–7.)

Doubtless it is true, as pointed out in Swift's brief (14–5), that the distance to its proposed plant is about the same as that to the stockyards. But, if the Commission, in meeting its transportation and rate problems, should always treat distance or other mathematical guide as governing, that would often result in the narrowing of areas of production contrary to the interests of consumers, of many producers, and of the general public. Cf. *Ayrshire Corp.* v. *United States*, 335 U. S. 573, 576, and cases cited. And here, too,

the Commission had to particularly consider the public interest as affected by the general disruption in service that would result from compliance with Swift's demand.

Coming to the question whether in any event the joint rates at the line-haul level sought by Swift include compensation for the delivery of livestock to its proposed plant, the Commission's report says (R. 78–79):

> The line-haul rates on livestock to Chicago are Commission-prescribed rates. In *Chicago Livestock Exch.* v. *Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, 545, 546, we said that "the line-haul carriers operate over the tracks of the Chicago Junction to the Union Stock Yards and make delivery there thereby making these yards their own terminals." We pointed out that in prescribing the rates on livestock to Chicago, among other markets, there was specifically taken into consideration as an element "the rendition of terminal service in connection with the transportation of livestock," and there was included what was considered "sufficient to cover such terminal services under a normal operation as well as to cover the unloading and loading of livestock at public stockyards," but we did not there consider what the services would be in connection with deliveries of livestock by the Junction on private industrial tracks. That carrier did not then and does not now perform such services.

The Commission report also discusses at some length the Section 3 issues and certain others raised by Swift which will, however, be left for later mention when reached in argument.

Thereafter, the report concluded with the following findings and conclusions: (R. 80, 81.)

> The evidence affords no basis for a conclusion that the terminal charge of the Junction in addition to the line-haul rates is unreasonable for deliveries of livestock to the proposed plant, considering services and modification of services that would be required for the desired deliveries and the effect upon terminal operations generally of performing such delivery service to the proposed plant.
>
> The Junction provides for switching charges on "all carload freight." That provision, without qualification, includes livestock. There is therefore a holding out by the Junction to switch livestock to and from industries, sidings, team tracks, and districts listed in the tariff. The published switching charge is appropriate for any switching that may occur of cars of livestock to complainant's proposed plant. It does not appear that the maintenance of a switching charge for livestock will have any detrimental effect upon terminal operations.
>
> We find (1) that in the circumstances presented the published switching charges in addition to the line-haul rates will not be unreasonable or otherwise unlawful for

the transportation of livestock for delivery on the private side-tracks to be constructed by complainant, which will connect with the Junction, provided that the tracks to be constructed will be adequate for deliveries by the Junction at its ordinary operating convenience and without interruption or interference, and (2) that establishment of joint rates for the transportation of this traffic is not necessary or desirable in the public interest.

We further find that the proposal to specifically exempt livestock from the traffic which will be transported by the Junction at Chicago and to cancel the application on livestock of switching charges, except to and from chutes and sidings at the Union Stock Yards at that point, is not just and reasonable.

Following entry of the Commission's order carrying out its findings, Swift brought its suit to set aside the order (R. 1). The United States and the Commission filed separate answers (R. 90, 94). Having been given leave to intervene (R. 97), the railroads (including the River Road, lessee of the Junction) filed their answer (R. 98). Others intervening and filing answers were the Union Stock Yards (R. 125), the Chicago Live Stock Exchange, the Chicago Traders Live Stock Exchange (R. 132), the National Live Stock Producers Association and the Chicago Producers Commission Association (R. 135). At the hearing before the specially constituted dis-

trict court a complete record of the proceedings before the Commission, including exhibits, was introduced (R. 196). The court's findings of fact and conclusions of law (R. 197-209) were filed May 28, 1951; its order dismissing Swift complaint (R. 210) was entered June 21, 1951.

SUMMARY OF ARGUMENT

I

What appellant Swift sought of the Commission in this case was an order requiring private delivery to it, at its private side track, without any charge in addition to the line-haul rate. But the line-haul rates do not include compensation for such switching, and the Chicago Junction Railroad could not be expected to perform such switching without compensation.

The Commission could neither ignore the history of the development of the stockyards area nor the fact that inauguration of regular, continuing switching service to effect plant delivery of livestock would inevitably interfere with, and delay, the Junction's dead freight service and the operations of the line-haul carriers in making delivery of livestock to the stockyards, all to the detriment of producers and consumers generally and to the public interest.

Taking these factors into account, the Commission could properly, and did, find that the granting of Swift's request would "seriously

interfere with, delay, and disrupt terminal transportation operations and the movement of livestock generally."

II

The Commission's findings that the switching charge upheld had not been shown to be prejudicial and discriminatory are amply supported by the evidence. It is clear enough, as the Commission found, that live freight—cars filled with cattle—cannot be handled in the same manner as dead freight. The measure of the transportation services rendered the former is substantially greater than that required by the latter. Cars of livestock cannot be subjected to rough shocks or jolts, and the Federal 28-hour law requires special handling of livestock, not necessary with respect to dead freight, in the interests of economy, safety, sanitation, and health.

Swift did not bear its burden of showing that other packers, under substantially the same conditions and circumstances, were being accorded perferred treatment. The Union Stock Yards is not a packer; it has been held by this Court to be a terminal, and terminal delivery cannot be equated with private sidetrack delivery. Swift's Omaha plant is not in the congested stockyard area as its proposed plant would be, and so the fact that delivery there is made at the line-haul rate does not show discrimination.

United States v. *Baltimore & Ohio R. Co.*, 333 U. S. 169, was quite a different case. There was not involved in that case the congestion and delays which would be a consequence of the private side-track delivery Swift seeks here. Indeed, in that case, involving the Cleveland stockyards area, railroads had been making plant delivery of live-stock for many years, and the only question was whether the Yard Company's ownership of track could be used as a device for terminating such plant delivery which adversely affected the Yard Company's business.

III

The Commission's decision in this case was in no way based on the covenant between the River Road and the Union Stock Yards. It was based on transportation standards, and was the product of an effort to give effect to the interests of producers, consumers, carriers and the general public. To suggest that the private agreement referred to was in any respect influential on the Commission is an affront to that public body which is wholly unjustified.

IV

The switching charge upheld by the Commission in this case is the same (subject to general increases) as that it upheld, almost twenty years ago, when Hygrade Food Products asked for what Swift is now here seeking. (195 I. C. C. 553.)

It is not a penalty charge directed at Swift, or at livestock, or designed indirectly to accomplish an indirect prohibition of private sidetrack delivery to Swift. For the history of the charge demonstrates that it was designed to apply to "all carload freight" not merely livestock.

Swift had the burden of showing that charge to be unreasonable; it failed to meet that burden and hence cannot complain simply because it is not accorded private delivery at rates which would be lower than its expenditures for delivery at the Union Stock Yards or at the Omaha plant.

ARGUMENT

I

In determining the issues raised in the proceedings, it was essential that the Commission consider the lay-out of yards and tracks of the Junction; the Junction's present operations in handling dead freight; the method by which livestock had for many years been handled by the line-haul carriers to the stockyards; and the physical operations that would be necessary if the Junction were required to make private-track delivery of livestock

Based on allegations that the interstate rates, charges and practices on and in respect of direct shipments of livestock to its plant in the stockyard area of Chicago were unreasonable and unduly prejudicial in violation of sections 1 and 3, Swift's complaint prayed the Commission to order the defendant carriers (line-haul and terminal) to establish in lieu thereof and apply

in future just and reasonable rates, charges and practices, including joint through rates between the line-haul carriers and the Junction, such rates to cover delivery of the livestock on a private siding at its plant and not to exceed the rates charged on shipments of livestock to the stockyards and other points in Chicago where delivery is afforded without charge in addition to the line-haul rates.

Thereupon, the Junction which had never, except in an emergency, handled livestock in switching service and yet, under the joint rates sought, would be the carrier making switching delivery thereof at the plant which Swift proposed to construct with connecting track in Packingtown, filed schedules proposing to specifically exempt livestock from the traffic it would transport and to cancel the application on livestock of all switching charges published by it, except to and from chutes and sidings at the stockyards. By action of the Commission, supplemented by voluntary action of the Junction, the operation of the schedules was postponed pending the Commission's decision. The two proceedings were heard on a consolidated record and decided in the same report (R. 57, 59).

The main issue presented was whether or not Swift was entitled to delivery without charge in addition to the line-haul rates of its direct shipments of livestock on the private sidings at a plant it proposed to construct in Packingtown just

north of its present plant (R. 59, 63). Swift's demand ignored the heavy burden of switching livestock through the crowded main and base yards of the Junction and thence over the latter's spurs to Swift's proposed plant. The line-haul rates do not include compensation for such switching (R. 78–79); the Junction could not be expected to perform such switching without compensation. And it is not apparent that the establishment of joint through rates between line-haul carriers and the Junction would eliminate the heavy burden of switching livestock through the Junction's yards and over its spurs to Swift's proposed plant. Moreover, a factor having to be particularly considered was that the inauguration of regular, continuing, switching service to effect plant delivery of livestock would necessarily interfere with and delay the Junction's dead freight service and the operations of the line-haul carriers in making delivery of livestock to the stockyards, all to the detriment of producers and consumers generally and to the public interest.

Accordingly, in order to properly determine the issues raised, the Commission regarded as necessary that it consider the layout of the yards and tracks of the Junction; the Junction's present operations in handling dead freight; the method by which the line-haul carriers had for many years transported livestock to the stockyards; the physical operations that would be necessary if the

Junction were required to make private-track delivery of livestock, as sought by Swift; and also, in order to avoid undue preference and prejudice, if it were required to make similar deliveries to Swift's competitors.

There are few cases, Court or Commission, involving shipments (direct or market) of livestock to the Chicago stockyards which have been determined without giving consideration to the history of the stockyards and of the company's terminal railroad (now the Junction), the conditions which induced the construction thereof, the rapid extension of the City, its streets and industries, into the area, and other conditions accounting for the practices of the stockyards or those of the railroads serving it. This has always been true of the Courts' decisions involving direct shipments of livestock consigned to packers at the stockyards. *Swift & Co.* v. *United States,* 316 U. S. 216; *Armour & Co.* v. *Alton R. Co.,* 312 U. S. 195; *Atchison, T & S. F. Ry Co.* v. *United States,* 295 U. S. 193; *Adams* v. *Mills,* 286 U. S. 397. In the *Swift case, supra* (pp. 222–3) this Court quoted from *Adams* v. *Mills,* as follows:

> * * * That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so. Whether the unloading in the yards was a part of transportation was not a pure question of law to be deter-

mined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained. * * *.

Later on in its decision in the *Swift* case, this Court said (pp. 225–227):

> In determining whether the Yard Company's unloading pens were suitable points at which to terminate the duties of carriers to consignees, and points where the consignees entered into a relationship with someone other than the carriers, the Commission was justified in considering, as it did, all that would account for the evolution of the practice complained of, as well as the effect of existing and proposed practices on the interest of the carriers, the public, and other shippers. *Adams* v. *Mills, supra,* at 409, *et seq.; Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U. S. at 198, *et seq.; Armour & Co.* v. *Alton R. Co., supra,* at 201. Neither the railroads nor the Stock Yards exist for the benefit of the

packers alone. Their patronage is large and important, but neither in the regulation of the carriers nor in the regulation of the Stock Yards are they entitled to facilities or treatment that will ignore the existence of other interests. The Stock Yards are not only a facility for the transportation of direct shipments from points of country origin to the packers; they also are an important factor in the entire animal industry of the United States. * * *

The bulk of the movement of stock is received in the Yards during the first days of the week, and approximately three-fourths of the daily movement is unloaded between three and eight in the morning. * * * * * * The customary handling over many years led to the building up of a physical plant which the Commission finds makes it physically impossible to remove this stock from the unloading pens except by use of the property of the Yard Company.

The interests of the public and of the community are entitled to consideration. This transportation is of a special kind of property on the hoof, which calls for special handling in the interests of economy, safety, sanitation, and health. The Commission has found that "the evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago."

The history and the practice deemed so weighty by this Court in the past, Swift would now prefer to put aside—to label as a product of "Railroad Statics" (Appellant's Br. 45, 89, 135), and so labeled to be ignored. In their stead, appellant bears heavily on the injustice and perhaps illegality involved in forcing packers, like Swift, to use the Union Stock Yards and pay them for unwanted and unnecessary services.

That these grievances have no place in this case, arising under the Interstate Commerce Act, has already been made clear by this Court. In *Swift & Co.* v. *United States,* 316 U. S. 216, 232–233, this Court said:

> Neither the Interstate Commerce Commission nor this Court can assume that the charges or practices of [the Union Stock Yards] are unfair or unreasonable, that it is charging for services that are not performed or facilities not used, or that it is imposing on consignees unnecessary services. Nor can the Commission or this Court assume that, if unreasonable practices or charges are imposed by this utility, the Secretary of Agriculture would fail to correct them upon an appropriate complaint in a proceeding in which the Yard Company is a party and may defend its practices for itself. In any event, Congress has provided that the Secretary of Agriculture is the forum in which such charges and practices may be questioned and may be weighed in the interest, not only of the

> packers but of others who use the Yards and markets and who might be affected competitively by granting the packers' present demands. Congress has established appropriate forum in which any complaint of the packers against the real party in interest may be heard and any lawful grievances adjusted, and the Commission was quite right in refusing to trespass on its jurisdiction.

Thus, the charges imposed by Union Stock Yards have no bearing whatever on this case. Cf. Appellant's Brief, pp. 12–13, 117–141.

While, in the *Swift* case, *supra*, and the other so-called "egress" cases, the basic question involved—the point where transportation ends—was one committed to the Commission, equally, in the case here, the questions whether Swift was subjected to undue prejudice, whether the carriers' practices respecting terminal deliveries were unreasonable, whether the joint rates sought were in the public interest, all were questions committed to administrative judgment, and clearly, in determining them, the Commission was expected to have full evidence as to past and present conditions accounting for existing practices as well as evidence as to the effect of proposed practices on the carriers and on producers, consumers, and the general public. As stated in the Commission's report (R. 72):

We have indicated generally the difficulties which would confront defendants if required to make delivery of livestock at complainant's plant, the basic difficulty being that such method of delivery is not adapted to defendant's service, tracks and yards, as specially designed and developed, along with the city's intensive development, for performance of the centralized delivery service rendered at Chicago. For some 70 years the method of conducting terminal operations in the stockyards district has been for the line-haul carriers, using Junction tracks, to carry all shipments of livestock [11] to the stockyards and make deliveries there, and for the Junction to perform the switching and spotting of other freight for the packers and many other industries in the area. As a result, the Junction's main tracks, its yards and subyards and their tracks, are peculiarly designed and fitted for the operations and service described, and any change, particularly as contemplating deliveries of livestock to the plants of the packers, would, as might be expected and as is shown, require a conflicting use of such yards and tracks and subject defendant's operations to interference and delays.

[11] With the exception of team track deliveries and deliveries to Swift at the Omaha Plant site, referred to in footnote 4, page 5, *supra*.

Continuing, the Commission's report outlined in considerable detail the adverse effects of any undertaking by the Junction to make switching deliveries of livestock through its yards, both as blocking and delaying the trunk lines' trains of livestock seeking ingress to the stockyards and as delaying and disrupting the Junction's operations in classifying and switching dead freight to and from the 499 industries on its lines. Thereafter, the Commission stated and found (R. 76–77):

> Interferences with the movement of livestock to the stockyards is a serious concern not only of defendants but also of producers and livestock marketing agencies who desire expeditious movement of livestock and continued functioning of the public market in a manner that is adequate for their needs. * * *
>
> We may * * * disapprove the inauguration of a continuing practice of delivering livestock directly to packers in circumstances where, as we have found would be the case here, such practice would seriously interfere with, delay, and disrupt terminal transportation operations and the movement of livestock generally. The proposed complete exemption of livestock from transportation by the Junction under any circumstances is not justified. There is no warrant, however, for a conclusion that the establishment of joint rates as desired by complainant is necessary or desirable in the public interest.

II

Swift's allegation that the Commission erred in failing to find that the existing rates, charges and practices of the carriers resulted in undue prejudice and preference in violation of Section 3 is without merit

As regards Swift's contention that the carriers' existing rates, charges and practices on and in respect of shipments of livestock to its proposed plant resulted in undue prejudice to livestock as a commodity, it will be noted that the Commission found (R. 65–72):

> The measure of the transportation services rendered shipments of live animals is substantially greater than that accorded dead freight. Livestock cannot be switched in the same manner as other freight. In the ordinary and usual course of classifying dead freight by the Junction, the engine pushes a string of cars along a track leading to the classification tracks. Uncoupled cars are "kicked" or given impetus to roll freely through a switching lead onto the proper classification track. Manifestly, if livestock were so handled it would result in injury to the animals by being thrown against the ends or sides of the cars or knocked down. Cars of livestock must necessarily come to rest without rough shocks or jolts. * * *

Subsequently, in discussing the difficulties the Junction would encounter in classifying and switching livestock in yards, already worked to capacity in handling dead freight; the report

shows in considerable detail the greater service that would have to be rendered livestock than is accorded dead freight (R. 72–4). In fact, it seems beyond dispute, not only that the measure of service rendered livestock is greater than that accorded dead freight, but that the circumstances and conditions that accompany its handling are far different. As stated in the previous *Swift case, supra,* p. 227:

> * * * This transportation is of a special kind of property on the hoof, which calls for special handling in the interests of economy, safety, sanitation, and health. * * *.

In the proceeding before the Commission Swift had the burden of showing that the rates in effect were unduly prejudicial to it and preferential of its competitors. To do this Swift was required to show that other packers under substantially the same conditions and circumstances were being accorded preferred treatment. Swift failed to sustain this burden. Not only did Swift fail to show that facts, circumstances, and conditions at other midwestern points were the same or very similar to those at Chicago,[12] but rather

[12] The record shows that at the other midwestern points the so-called preferred packers occupied the same position with respect to line-haul carriers as did Swift with respect to its private sidings on the right-of-way of the Burlington which serves Swift's Omaha plant (Ex.'s 12 and 53, R. 1083, 1868). In this connection Swift's position becomes in effect one of complaining, among other things, because Swift itself at its

the evidence indicates that Swift was in a better position than other Chicago packers because Swift had the choice of receiving its "directs" either at the Omaha Packing Company or at the Stockyards.

The cases cited by Swift as involving situations analogous to those in this case do not sustain its position here. In *Neuhoff Packing Co. v. L. & N. R. Co.*, 268 I. C. C. 271, the complainant was a wholly owned subsidiary of Swift and it operated a meat-packing plant at Nashville, Tenn. The complaint there alleged that the railroads' refusal to deliver interstate carload shipments of livestock upon complainant's sidetrack was unreasonable and unduly prejudicial to the complainant, and unduly preferential of its competitors in the southeast, in violation of Sections 1 and 3 of the Interstate Commerce Act. The Commission upheld the complainant after stating that "the sole basis for the defendants' refusal to make the sidetrack deliveries to the complainant is a provision in a contract with the stockyard company which designated the stockyard as the only depot for receipt of livestock in Nashville." (268 I. C. C. 271, 273.) The Commission went on to say that if the contract "transgresses or conflicts with any of the provisions of the Interstate Commerce Act, it must be disregarded, and that since no rule of universal ap-

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Omaha plant is receiving a preference over Swift itself at its proposed new plant.

plication could be laid down, each case must be determined according to the facts, circumstances, and conditions presented." (268 I. C. C. 271, 273.)

In *Nashville Abattoir, Hide & Melting Assn.* v. *L. & N. R. Co.*, 40 I. C. C. 134, the issues raised were substantially the same as those in this case. There, as here, the Commission found that upon the facts of record defendants' regulations and practices governing the delivery of livestock in Nashville were not shown to be unreasonable or unjustly discriminatory. The Commission distinguished the *Neuhoff* case from the *Nashville Abattoir* case on the ground that the facts, circumstances, and conditions in that proceeding are entirely dissimilar from those in the *Neuhoff* case.

In reaching its decision in the *Neuhoff* case, the Commission cited an analogous case as the basis of its decision. Thus, at page 274 of the *Neuhoff* case, the Commission said:

> In *Baltimore Butchers Live Stock Co.* v. *P. B. & W. R. Co.*, 20 I. C. C. 124, the Commission considered a situation similar to that here presented. There, complainant had yards for the receipt and care of livestock with a switch connection and sidetrack reaching the yards which were then and for many years had been in use. *No physical obstacles to the delivery of livestock at the yards were shown to*

> *exist.* That is the case here. [Emphasis supplied.]

The *Neuhoff* and *Baltimore Butchers* cases are readily distinguishable from this; in those cases no physical obstacles to the delivery of livestock were shown to exist. In the instant case the record and the Commission's findings demonstrate that the physical obstacles that would be encountered in switching livestock through the Junction's yards would be very great and that the undertaking of such service would seriously interfere with all terminal operations in the stockyard area.

Kriel v. *Baltimore and Ohio R. R. Co.*, 41 I. C. C. 434 (1916), involved another unsuccessful attempt to obtain plant delivery of livestock on the ground that defendant carriers' customary method of delivery to the Union Stock Yards in Baltimore, about 3½ miles from complainant's plant, was unreasonable and unduly prejudicial. Complainant relied on the *Baltimore Butchers* case, *supra,* but the Commission, distinguishing that case, said:

> If defendant is required to provide the desired delivery for complainant, other packers might with equal propriety demand similar treatment. Defendant states that to make such delivery, it would be necessary to provide a permanent double-deck unloading chute and also a pen to prevent the hogs from straying over the streets. Cars

> for unloading are ordinarily placed on the tracks in question during the night, and in certain seasons there is considerable congestion. Defendant states that under present train schedules livestock shipments would not arrive there until 9 A. M., and that the delays incident to the spotting of cars, especially if the tracks were congested, might necessitate the return of such livestock to the Claremont yards to be watered, fed, and rested within the time required by law.
>
> It cannot be denied that to have the unloading of livestock concentrated facilitates inspection, tends to prevent the spread of disease, and improves sanitary conditions generally (p. 435).

In addition to the *Neuhoff* and *Baltimore Butchers* cases, Swift, before the Commission, as here, relied particularly on the so-called *Cleveland Stockyard* case, 266 I. C. C. 55, the Commission's order in which was sustained as valid in *United States* v. *Baltimore & Ohio R. Co.*, 333 U. S. 169. In that case, Swift's plant and the plants of certain other packers were reached by a spur of the New York Central, a middle segment of which was owned by the Cleveland Union Stock Yards Company but for years had been operated over by the Central under trackage right agreements. The agreement of 1924 was cancellable by either party on 30 days' written notice; and, in the early 1930's the Yard Company, whose income

is largely derived from fees it charges for unloading and delivering livestock into pens within its yard, concluded that it was losing patronage and fees because of the deliveries of livestock to Swift and other packers on the Central's spur. With a view toward collecting such fees, the Yards Company instituted negotiations with the Central which in 1935 resulted in a modified agreement. Whereas, under the former agreement the Central was granted the free and uninterrupted use of the track segment (called track 1619), the modified agreement added the clause "except for competitive traffic a charge for which shall be the subject of a separate agreement."

In subsequent negotiations the parties agreed that the words "competitive traffic" meant livestock, and the Yards Company demanded that the Central either stop carrying livestock over track 1619 to Swift and other packers or pay it for such use thereof an amount equivalent to the fees the Yards Company would have collected had the livestock consigned to such packers been unloaded and delivered in its yard. This amount was considered exorbitant by the Central and the other railroads for which it performed switching and they refused to pay it. The result was that in 1938 the railroads ceased delivering livestock to the sidings of Swift and the other packers served by the Central's spur, although under agreement with the Yards Company they continued to use

the spur for delivery of all other kinds of commodities.

Swift filed its complaint with the Commission and, following full hearings, the Commission found that the railroads' refusal to carry livestock to Swift's plant subjected Swift to undue prejudice and unduly preferred several nearby competing plants which continued to receive deliveries of livestock on sidings which could be served without using track 1619. The Commission further found that under the circumstances shown at Cleveland such refusal of the railroads constituted a violation of section 1 (6) and also of section 1 (9). (266 I. C. C., at 68–70.) In connection with these findings it is important to keep in mind that the railroads had made plant delivery of livestock at Cleveland for many years. The operations there were geared to that method of delivery just as at Chicago they have developed on the basis of delivery to the public yard. The Commission found (pp. 68–69) that for years all the defendant railroads had recognized that the performance of plant delivery of livestock was included in the line-haul rates to Cleveland while in the case here the Commission found that the line-haul rates on livestock to Chicago which it had prescribed do not contemplate or cover deliveries to plants on the Junction.

The Commission's findings in the *Cleveland Stockyard* case were not in fact challenged. All turned on the Yard Company's ownership of track

1619 and the question whether, although contracting for the use of the track as part of the line of an interstate railroad, it could compel that railroad to operate in a way which violates the Interstate Commerce Act. This Court's answer to the question was "no"; that "the Commission's order was authorized by statute and that it does not deprive Stock Yards of its property without due process of law." *United States* v. *Balto. & O. R. Co., supra,* p. 177.

Appellant complains that an unlawful discrimination is involved in "the transportation of livestock to the Swift sidetrack for the line-haul rate plus $39.24 per car switching fee, while similar transportation of the same commodity to the Union Stock Yards is made at the line-haul rate without any switching fee" (Br. 70).

This complaint ignores what this Court has always recognized to be the fact: "That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so." *Adams* v. *Mills,* 280 U. S. 397, 409; *Swift & Co.* v. *United States,* 316 U. S. 216, 222. In recognition of this fact, Congress has explicitly and clearly distinguished between public stockyards deliveries and other deliveries. By Section 15 (5) of the Interstate Commerce Act, Congress has stipulated for stockyards delivery at the line-haul rate but gone on to provide that "Nothing in this paragraph shall be construed to affect * * * the duty of performing service as to

shipments other than those to or from public stockyards."[13] [Italics supplied.]

This Court has said that a carrier cannot exact an extra charge for the use of a terminal.[14] It hardly follows that a carrier may not exact an extra charge from one who chooses not to use the terminal and who desires and receives private sidetrack delivery.

Whether such a charge is unlawfully exacted depends upon "whether in view of the conditions of the distribution of the carload freight through a large area there was in fact such a similarity of movement as to negative the basis for a separate charge." *Los Angeles Switching Case*, 234 U. S. 294, 312. Here the Commission found no

[13] Section 15 (5) provides, in full, as follows:

SEC. 15. (5) Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards, of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee, or owner, or to try an intermediate market, or to comply with quarantine regulations. The commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

[14] *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 135–136.

such similarity of movement (R. 70) and to Swift's insistence "that the contrary of this finding is self-evident," this Court's answer in the Los Angeles Switching Case has equal force here: "The facts with respect to the movement of freight in a great terminal district are by no means so simple that the deliberate judgment of the Commission can be regarded as contradicting the obvious." 234 U. S., at 314.

III.

Swift's contention that the Commission's order gives effect to an unlawful covenant is without merit

Swift urges at some length (Br. 117–34) that the Commission's order gives effect to a covenant by which the River Road, a subsidiary of the New York Central, is to operate the Junction in a way discriminating in favor of the stockyards business. In the Commission proceeding Swift introduced a letter (Ex. 57, R. 1038–9, 1961–2) written by counsel for the stockyards to the General Counsel of the River Road and New York Central stating that those carriers were obligated by such covenant to defend against Swift's complaint and to take the proper steps to raise the issues necessary for a determination of all the questions involved. Swift's brief (123) suggests that the River Road and New York Central undertook to defend against its complaint only because of the letter. In its report the Commission

refers to the covenant and Swift's contention as follows (R. 79–80):

> Complainant asserts that a contractual relation exists between the Union Stock Yards and the Chicago Junction under a lease dated December 1, 1913, whereby the carrier agreed "to conduct, manage, and operate the line of railroad by this instrument demised, and insofar as possible the same to conduct in such manner as will tend to the benefit, advantage, and behoof of the business and affairs of the Yards." The covenant quoted was incorporated in a later lease executed May 19, 1922, when the Chicago Junction subleased its line to the Chicago River & Indiana, a wholly owned subsidiary of the New York Central Railroad, for 99 years with an option to renew in perpetuity. *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213, 216. The effect of the leases was to completely divest the Union Stock Yards of operation and control of the terminal railroad, the Court saying that by ceasing to operate or control its railroad directly or indirectly, the Union Stock Yards restricted its transportation service to the loading or unloading of livestock as specified in its tariff. The operation of the Chicago Junction is subject not only to the provisions of the Interstate Commerce Act but also to the conditions imposed by the Commission in the *Chicago Junction Case*, *supra*. Those conditions were par-

> ticularly intended to insure that the Chicago Junction and the Chicago River & Indiana should be operated as neutral terminal carriers, without special advantage favoring the New York Central but the conditions were and are broad enough to inhibit operation of the Chicago Junction to the special advantage and interest of the Union Stock yards.

The complete answer to Swift's contention is that the Commission's decision is not in any respect whatsoever based on the contract clause in question. The Commission not only gave it no weight at all in reaching its conclusion, but on the contrary rejected the suggestion that it had any significance. The Commission's attitude on that question was succinctly stated in the *Neuhoff case, supra,* where it said that if any private contract conflicts with the provisions of the Interstate Commerce Act then it must be disregarded. What Swift wants is that its proposed plant in Packingtown be accorded at the flat Chicago rate the same delivery service as is accorded its plant and also all other packing plants at Cleveland. But, as above stated, operations in Chicago have developed on the basis of an entirely different method of effecting deliveries. That this was known to the Commission and all parties to the *Chicago Junction case,* 71 I. C. C. 631, is shown by the Commission report in that case wherein it is stated (p. 633):

> The movement of live stock in and out of the Junction yards is essentially different from the method of handling the dead freight, in that each carrier moves its trains to the unloading chutes with its own power, and goes into the pens for outbound stock destined for its own line. All parties concede that that is the only practical method of handling that traffic. * * *

As is so unmistakably shown in its report in the case here, the Commission's decision was based on transportation standards, giving effect to the interests of producers, consumers, carriers and the general public. It was not in the slightest degree influenced by any special interest.

IV

The switching charge of the Junction in addition to the line-haul rates is not a penalty charge as termed by Swift

As bearing on the switching charge of the Junction to points on its lines, the Commission said in its report in this case (R. 77–8):

> In *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry Co.*, 195 I. C. C. 553, complainant therein alleged, among other things, that switching charges demanded for the placement of carloads of livestock at complainant's plant directly north of the unloading pens of the Union Stock Yards in Chicago, were inapplicable and, if applicable, were unreasonable, un-

duly prejudicial to complainant, and unduly preferential of the Omaha Packing Company, in Chicago, a competitor of complainant.

The plant of the complainant in that proceeding also is served only by the rails of the Junction. It was there sought, as in the instant proceeding, to have certain private tracks used for the receipt of livestock without any additional charge for switching. We found that the published switching charge there assailed, $12 per car, which, as increased by subsequent general authorized increases, is the identical switching charge here assailed, was applicable to the placement for delivery of carloads of livestock at complainant's plant, and had not been shown to be unreasonable or otherwise unlawful.

In the report in that proceeding we said at page 555:

While deliveries are made at the plant of the Omaha Packing Company without the assessment of a switching charge such as applies to deliveries at complainant's plant; there is no indication that transportation services, conditions, and circumstances connected with deliveries at complainant's plant would be substantially similar to those connected with deliveries at the plant of the Omaha Packing Company, and no facts of record lead to the conclusion that charges applicable to such services as may be performed in making deliveries at complainant's plant are un-

reasonable or that the differences in these charges are not warranted.

Apparently, Swift, in contending that the Junction's switching charge is a penalty charge means that it is, and has been, a charge made purposely high to force deliveries of livestock at the public yards (Appellant's Br. 57). But, as pointed out in the Commission report here (R. 80), the switching charge is one applying on "all carload freight." It is because the tariff provision is thus unqualified that it includes livestock, but, for the same reason, it includes and applies to any dead freight as to which joint rates have not been established, or specific charge published. Certainly, as so applying on both dead freight and livestock, it cannot be logically assumed that the switching charge is, or ever was, one made purposely high to force deliveries of livestock at the public yards instead of at the plants of the packers. It may be that in cases where the charge applies to dead freight it is excessive, but the record makes even that assumption doubtful. The evidence is all one way, fully supporting the Commission's finding that in view of the services and modification of services to effect the desired deliveries of livestock and the effect on terminal operations generally, the switching charge in addition to the line-haul rates will not be unreasonable or otherwise unlawful.

What Swift sought was joint through rates not

to exceed the flat line-haul rates to Chicago. But the Commission could not disregard the evidence. Apparently, Swift believes that any switching charge not adjusted so as to be below the Stockyards yardage charges or below his costs for trucking the animals from the Omaha plant site would be penalty charges. But the statute does not contemplate that the Commission apply such standards.

CONCLUSION

For the above reasons it is respectfully submitted that the decree of the lower court should be affirmed.

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